IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1977

No. 77-180

Robert W. Hagopian, Appellant

vs.

The Justices of the Massachusetts
Supreme Judicial Court, Appellees

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

pro se

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IN THE
SUPREME COURT OF THE UNITED STATES

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No.

Robert W. Hagopian, Appellant

vs.

The Justices of the Massachusetts Supreme Judicial Court, Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

Appellant, Robert W. Hagopian, appeals from a judgment of a three-judge district court for the district of Massachusetts dismissing his complaint. He submits this statement to show that the Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are present.

OPINION BELOW

The opinion of the district court has not been reported to date. It is reproduced in Appendix B (pages 3a-5a) to this statement.[1]

JURISDICTION

This suit was instituted by plaintiff Robert W. Hagopian on July 29, 1974 to challenge the constitutionality of Article XXX of the Massachusetts Constitution.[2] The cause of action was predicated on 42 USC §1983 and jurisdiction rested upon 28 USC §1343(3). The plaintiff requested the convening of a three-judge court in his complaint and pursuant to 28 USC §§2281 and 2284 as then in effect. The district court denied plaintiff's request on May 24, 1976 and simultaneously dismissed the suit for lack of a sufficiently substantial question to sustain jurisdiction. Notice of appeal to the Court

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[1] A previous opinion of the Court of Appeals for the First Circuit is reproduced in Appendix A, page 1a.

[2] Article XXX has statewide application and constitutes a state statute within the meaning of 28 USC §2281 as it was in effect at the commencement of this suit.

of Appeals was filed in the district court on June 17, 1976.

On appeal, the Court of Appeals reversed and remanded the case to the district court to convene a three-judge court.[3] A three-judge district court was subsequently convened pursuant to 28 USDC §§2281 and 2284, and on March 23, 1977 it dismissed plaintiff's complaint.[4]

Plaintiff filed a notice of appeal to this Court[5] on April 25, 1977 invoking this Court's jurisdiction upon the authority of 28 USC §1253 for direct appeal from a decision of a three-judge district court.[6]

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[3] See Appendix A, page 1a.

[4] See Appendix B, pages 3a-5a.

[5] Notice of appeal to the United States Supreme Court is reproduced at Appendix C, page 6a.

[6] The time for filing this jurisdictional statement was extended by the circuit justice to, and including, July 25, 1977.

STATUTES INVOLVED

Article XXX of the Massachusetts Constitution reads as follows:

> Art. XXX: In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them: the executive shall never exercise the legislative and judicial powers, or either of them: the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men.

Rules 4:01-4:06 of Rules of the Supreme Judicial Court are set forth in Appendix D, pages 7a-14a.

QUESTIONS PRESENTED

1. Does Massachusetts' vesting of unbridled police and standardless taxing powers to a non-elected non-accountable state organ violate the equal protection and due process clauses of the Fourteenth Amendment?

2. Does Massachusetts' allocation of governmental powers in a non-elected

non-accountable state organ abridge the right to vote and right to political association protected by the First and Fourteenth Amendments?

3. Does Massachusetts' "fencing out" of economic regulation of its bar from its political processes infringe the right to vote and right to political association guaranteed by the First and Fourteenth Amendments?

STATEMENT OF THE CASE

The judicial power in Massachusetts devolves from Article XXX of the state constitution. In particular, and insofar as this case is concerned, Article XXX has been construed as vesting the power to "regulate" the Massachusetts bar in the justices of the Supreme Judicial Court and to the exclusion of the Massachusetts legislature.[7] The justices are appointed to their office by the governor with the consent of the executive council, both duly elected and apportioned bodies.

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[7] See Opinion of the Justices, 279 Mass. 607; and Opinion of the Justices, 289 Mass. 607.

Each justice holds his position on good behavior and until age seventy.[8]

Pursuant to Article XXX, the justices of the Supreme Judicial Court promulgated on June 3, 1974, Rules 4:01-4:08 of Rules of the Supreme Judicial Court. See 365 Mass. 695, 696, et seq. (1974).[9] Rule 4:01 established a Board of Bar Overseers and Rule 4:02 required every practicing attorney to file a registration statement with the Board. Rule 4:03 required each attorney to pay a periodic assessment to defray the costs of attorney registration, disciplinary enforcement, and "reimbursement of losses distributed by the Client Security Board". Rule 4:04(1) created the Client Security Board, and its purpose was to administer a fund to reimburse clients who were defalcated by

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[8] Mass. Const. Pt. 1, art. 29; Pt. 2, c. §1, art. 13; and Pt. II, c. 3, art. 1, art. 2.

[9] These rules were the by-product of a petition filed by the Massachusetts Bar Association on December 3, 1970 to "organize the Bar of Massachusetts as a unified self-governing bar by the Rule of Court".

"members of the bar, acting either as attorneys or fiduciaries".

In its first fiscal year, the Board of Bar Overseers collected $333,571.31 in registration fees and in its second fiscal year $397,492.91. Out of these amounts, and pursuant to Rules 4:03(1) and 4:04(1), the Board of Bar Overseers turned over $50,000 to the Client Security Board during the first fiscal year and $100,000 during the second fiscal year. The Board of Bar Overseers also provided the Client Security Board with space and administrative services in an unascertained dollar amount. The Client Security Board has disbursed some of the monies turned over to it to clients and other persons who were defalcated by members of the bar. Some of these claims arose out of attorney-client relationships and others were based upon dishonest acts of attorneys acting in a fiduciary capacity such as a trustee or executor.

Subsequent to the promulgation of these rules of the Supreme Judicial Court, Robert W. Hagopian, a member of the bar since April 26, 1971, refused to pay that portion of the annual registration fee that was allocable to the Client Security Board. He instituted suit on July 29, 1974 against the defendant justices of the Supreme Judicial Court challenging the

constitutionality of Article XXX of the Massachusetts Constitution in that it vested "legislative" power in the non-elected non-accountable justices to promulgate the economic rules relating to the Client Security Board.[10]

The district court refused to convene a three-judge court, but the Court of Appeals reversed holding that plaintiff's complaint raised substantial constitutional issues.[11] On remand a three-judge court was convened. The Board of Bar Overseers and the Client Security Board intervened as amici curiae. The justices moved to dismiss for failure to state a cause of action and the plaintiff moved for partial summary judgment. These motions were submitted upon an agreed statement of facts filed by the parties. Oral arguments were presented to the three-judge court at which hearing the amici were represented by Robert W. Meserve, Esq., Chairman of the Board of Bar

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[10] During the pendency of this suit, plaintiff Hagopian has paid the annual registration fee under protest and, by agreement with the defendants, without prejudice to this suit.

[11] See Appendix A, page 1a.

Overseers. Extensive briefs were filed by the parties and the amici. Subsequently, the three-judge district court dismissed plaintiff's action holding that this Court's summary affirmance of In re Member of the Bar, 257 A.2d 382 (Del. 1969), appeal dismissed sub. nom., In re Reed, 396 U.S. 274 (1970), foreclosed all the constitutional issues raised by the complaint.

THE QUESTIONS ARE SUBSTANTIAL

I - Massachusetts' Vesting of Its Police and Taxing Powers in the Non-Elected Non-Accountable Justices of the Supreme Judicial Court Violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

Appeallant's first contention is that the provisions of the rules promulgated by the justices of the Supreme Judicial Court which hold some attorneys financially responsible for the defalcations of other attorneys are derivative of the state's police and taxing powers. As such, appellant asserts that these provisions are substantive economic regulations and must be promulgated by an elective state organ which comports with one-person one-vote standards or, alternatively, by an appointed state

body to which the task of carrying out "legislative" mandate has been properly delegated by an apportioned elective body.

In support of the first part of this contention, appellant relies upon Lathrop v. Donahue, 367 U.S. 820, 824, 827, wherein this Court held that the rules promulgated by the Wisconsin Supreme Court integrating the bar of Wisconsin were legislative in nature since they "regulate[d] the [legal] profession". By contrast, the rules relating to the Client Security Board go far beyond the mere registration and administration of the bar. They impose an affirmative economic burden on members of the Massachusetts bar and shower economic benefits on the general public. As such, they fall within the state's police powers so eloquently defined by Chief Justice Shaw in Commonwealth v. Alger, 7 Cush. 53, 85.

Moreover, the subject rules are derivative of the taxing power of the state. Although the annual registration "charge" is not a revenue raising measure, that portion which is allocated to the Client Security Board is disbursed to the general public. Hence the charge is a tax in contradistinction to a "registration fee":

Taxation is a legislative function and Congress, which is the sole [national] organ for levying taxes, may act arbitrarily and disregard benefits bestowed by government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, e.g., a request that a public agency permit him to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. National Cable Television v. United States, 415 U.S. 336, 340-341.

As substantive economic regulations, the subject rules fall within the umbrella of Reynolds v. Sims, 377 U.S. 533, and its fall-out progeny. Collectively these cases hold that all elective branches of state government which perform "governmental functions" must be apportioned in accordance with the rule of one-man one-vote.[12] Likewise,

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[12] Reynolds v. Sims, 377 U.S. 533; Hadley v. Junior College District, 397 U.S. 50.

a popular majority of a state's electorate cannot circumvent this requirement by delegating the state's legislative power to a state organ which does not comport with one-man one-vote principles,[13] nor may a properly elected and apportioned legislature dilute a minority's constitutional right to one-man one-vote representation by delegating legislative power to elected political subdivisions not based solely on population.[14] From the principles of these cases, it must follow that a properly apportioned legislature cannot debase a minority's constitutional right to one-man one-vote representation by unbridled and standardless delegation of its legislative powers to non-accountable appointed state officials. This issue was raised, but not reached, in Sailors v. Board of Education, 387 U.S. 105.

In Sailors, Michigan's local school boards were elected by qualified electors who were residents of a local district. Each local school board in a county sent a delegate to a biennial meeting where collectively all the

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[13] Lucas v. Colorado, 377 U.S. 713.

[14] Avery v. Midland County, 390 U.S. 474.

delegates elected a county school board of five members. Reviewing this distribution of legislative power, this Court held:[15]

> The Michigan system for selecting members of the county school board is basically appointive rather than elective. We need not decide at the present time whether a State may constitute a local legislative body through the appointive rather than the elective process. We reserve that question for other cases such as Board of Supervisors v. Bianchi, ante, p.97, which we have disposed of on jurisdictional grounds. We do not have that question here, as the County Board of Education performs essentially administrative functions; and while they are important, they are not legislative in the classical sense.
>
> Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangement to meet changing urban conditions. We see nothing in the Constitution

[15] 387 U.S. 109.

> to prevent experimentation. At least as respects non-legislative officers, a State can appoint local officials or elect them or combine the elective and appointive systems as was done here. ... For while there was an election here for the local school board, no constitutional complaint is raised respecting the election. Since the choice of members of the county school board did not involve an election and since none was required for these non-legislative offices, the principle of "one-man, one-vote" has no relevancy.

Although the issue of unbridled and standardless delegation of legislative power to appointed officials was not decided, appellant submits that a state may no more dilute an individual's constitutional right to one-man one-vote representation by vesting a segment of its legislative power to appointed officials whose action cannot "be measured by its fidelity to legislative will"[16] than it may permit its properly apportioned legislature to delegate legislative

[16] East Lake v. Forest City Enterprises, Inc., 426 U.S. 668, 675.

power to a misapportioned elective political subdivision. In either case, the vice is the same; and the equal protection clause of the Fourteenth Amendment is violated.

In the case at hand, it should be observed that the justices of the Supreme Judicial Court are appointed to serve until age seventy by the governor subject to approval of the executive council, both duly elected and apportioned officials. However, neither the governor nor the executive council, nor the state legislature, have delegated to the justices the police power to regulate lawyers. That power is vested in them by Article XXX of the Massachusetts Constitution. It is unbridled and standardless. Further, the justices have construed Article XXX to mean that they are free from any control of the Massachusetts legislature insofar as substantive regulation of the legal profession is concerned. Indeed, they have repelled all attempts by the Massachusetts legislature to regulate the bar in Massachusetts. See Opinion of the Justices, 279 Mass. 607; and Opinion of the Justices, 289 Mass. 607. Hence, the issue raised, but left unanswered in Sailors is squarely presented by this appeal.

Apart from the denial of the equal protection of the laws, appellant maintains that the vesting of unbridled and standardless legislative power in the non-elected non-accountable justices violates due process. While it is generally true that how a state distributes its legislative powers is not a matter of federal concern, Highland Farms Dairy v. Agnew, 300 U.S. 608, 612, this principle is subject to the limitations imposed by the Fourteenth Amendment.[17] In particular, this Court has held that the due process clause prevented a city from delegating the power to establish building setback lines upon the owners of two-thirds of the property abutting any street, Eubank v. City of Richmond, 266 U.S. 137. See also Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116. On the other hand, it has held that a state may confer its legislative power by referendum to all the people instead of just a segment of the people as in Eubank, Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 675:

> Courts have frequently held in other contexts that a Congressional

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[17] Cf. Hunter v. Erickson, 393 U.S. 385, 392

delegation of power to a regulatory entity must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will. See, e.g., Yakus v. United States, 321 U.S. 414 (1944); Amalgamated Meat Cutters v. Connolly, 337 F. Supp. 737 (DC, 1971). Cf. Federal Energy Administration v. Algonquin SNG, ___ U.S. ___. ... Assuming, arguendo, their relevance to state governmental functions, these cases involved a delegation of power by the legislature to regulatory bodies, which are not directly responsible to the people; this doctrine is inapplicable where, as here, rather than a delegation of power, we deal with a power reserved by the people to themselves.

However, as noted in Eastlake, this Court has never ruled on the constitutionality of standardless delegation to a non-accountable state organ.[18]

The issue is raised in the instant case, as the power to regulate the bar

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[18] Cf. Highland Farms Dairy v. Agnew, 300 U.S. 608, 612.

in Massachusetts is delegated by Article XXX with no "discernible standards". The power itself is unbridled and vested in a state organ which is not accountable or "responsible to the people" as the justices cannot be voted out of office in a popular election, or by initiative or referendum procedures set forth in the Forty-Eighth Amendment to the Massachusetts Constitution. Similarly, the justices are not accountable to their appointers, the governor and executive council, or to the elected representatives of the people, the Massachusetts legislature. Additionally the subject rules relating to the Client Security Board cannot be revoked, amended, or modified by the initiative or referendum procedures set forth in the Forty-Eighth Amendment.[19]

Accordingly, the question of whether a state may delegate standardless power to a non-accountable "regulatory entity" is squarely presented by this appeal. On the merits of the issue, appellant maintains that since the justices are "unaccountable", Massachusetts' vesting of its police and taxing powers via

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[19] Amendment Art. 48 Init., §2 and Ref., §2.

Article XXX violates the due process clause in the same way that the state's "standardless delegation" to private parties did in Eubank and Roberge. The wrong in both situations is functionally the same. Cf. Hampton v. Mow Sun Wong, 426 U.S. 88.

II - Massachusetts' Fencing Out of Economic Regulation of Its Bar From Its Political Processes Infringes the Right to Vote and Right to Political Association.

While this Court has never squarely held that the right to vote is guaranteed by the First and Fourteenth Amendments, it has maintained this right to be a "fundamental political right":

> Undoubtedly, the right of sufferage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement to the right of citizens to vote must be carefully and meticulously scrutinized. Almost a centruy ago, in Yick Wo v. Hopkins, 118 U.S. 356, the Court referred to "the political franchise of voting" as a

> "fundamental political right, because preservative of all rights." 118 U.S., at 370. Reynolds v. Sims, 377 U.S. 533, 562.

Likewise, in Williams v. Rhodes, 393 U.S. 23 at p.31, this Court noted the affinity between the right to vote and the right to political association:

> We have repeatedly held that freedom of association is protected by the First Amendment. And of course this freedom protected against federal encroachment by the First Amendment is entitled under the Fourteenth Amendment to the same protection from infringement by the States. Similarly we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

; and by Mr. Justice Harlan concurring at p.41 wherein he held that "[t]he right to have one's voice heard and one's views considered by the

appropriate governmental authority is at the core of the right of political association".

In light of these pronouncements, appellant maintains that Massachusetts has abridged his right to vote and his right to political association by excising the substantive economic regulation of the bar from its political processes. More particularly, Massachusetts has denied its attorneys the right to vote concerning regulations which govern them. The attorneys cannot bring about any substantive changes in the subject "state laws" by voting changes in their state representatives, or by voting changes in the governor or executive council, or by referendum or initiative. Clearly, the attorney's "voice in the election of those who make the laws under which ... [he] must live", has been stifled.

Placing these taxing regulations "beyond the recall of the votes of the people"[20] constitutes a denial of due

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[20] See Chief Justice Burger's speech at Georgetown University Law School, November 1971, 57 ABA Journal 1186: "Our history began with a revolution instituted to overthrow a government that was beyond recall by the votes of the people."

process; alternatively, the "fencing out",[21] of these regulations from the voting process Massachusetts has chosen violates the equal protection clause of the Fourteenth Amendment since it is directed at an identifiable class. When one views the fact that better than one-half of the states vest substantive economic regulation of the bar in their state legislatures or in the justices of highest state courts who have been properly delegated the task by elected representatives, it is manifestly obvious that there is no compelling state interest to justify Massachusetts' excision of its attorneys' right to vote and right to political association.

III - What This Appeal Does Not Involve.

Appeallant would like to call to this Court's attention that he does not challenge Massachusetts' right to substantively regulate the members of its bar, to discipline attorneys, to require them to file a registration statement, to pay an annual registration fee, or to be collectively and financially responsible for the defalcations by dishonest members. He endorses these commendable goals. His

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[21] Carrington v. Rash, 380 U.S. 89.

concern is directed solely to the means of accomplishing some of these ends and in particular to the non-elected non-accountable justices acting as a "super-state legislature", Ferguson v. Skrupa, 372 U.S. 726, in enacting "state laws" which tax the innocent for the defalcations of the guilty and which bestow benefits on the general public.

IV - The District Court Misapplied Hicks v. Miranda, 422 U.S. 332, and Did Not Reach the Issues Presented.

The district court dismissed appellant's complaint on the basis of this Court's summary affirmance of In re Member of The Bar, 257 A.2d 382, sub. nom., In re Reed, 396 U.S. 274. Precisely what federal issues appellant Reed intended to raise by his appeal is not exactly clear. However, in the two pages of his jurisdictional statement devoted to the merits of his claim, it appears that Reed relied solely on Spevack v. Klein, 385 U.S. 511.[22] Reed interpreted Spevack as holding that "the relationship between the bench and bar does not transcend the United States Constitution". With due respect

[22] Pages 8 and 9 of Reed's jurisdictional statement.

to the district court, appellant submits that this Court's summary affirmance in In re Reed, supra, does not control the disposition of the constitutional issues raised by this appeal.[23]

RELIEF

Appellant believes that the district court erred in ruling that all the constitutional issues raised by this appeal are foreclosed by this Court's summary affirmance in In re Reed, supra. For this reason, and in light of this Court's intervening decision of Mandel v. Bradley, ___ U.S. ___, 45 USLW 4701 (June 16, 1977), clarifying the rule of Hicks, appellant moves this Court to adopt the procedure used in Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District, ___ U.S. ___, 45 USLW 3565 (February 22, 1977), of vacating the decision of the district court and

[23] Appellant hastens to add that it appears that the Delaware Supreme Court had a "statutory grant of authority" from the Delaware legislature to promulgate the rules challenged in In Re Member of the Bar, supra.

remanding "for a full consideration of the issues, presented by appellant". Alternatively, appellant moves this Court to note probable jurisdiction and set this case down for plenary consideration of the issues raised herein.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 76-1280.

ROBERT W. HAGOPIAN,
Plaintiff, Appellant,

v.

THE JUSTICES OF THE
SUPREME JUDICIAL COURT
Defendants, Appellees.

Before ALDRICH and CAMPBELL
Circuit Judges and MURRAY*,
District Judge.

MEMORANDUM AND ORDER

Entered December 15, 1976

This is an appeal from the dismissal, by a single district judge, of a complaint attacking the constitutionality of a Massachusetts Supreme

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* Of the District of Massachusetts sitting by designation.

Judicial Court rule requiring all members of the Massachusetts bar to pay an annual registration fee, part of which is assigned to a fund to compensate clients with respect to defalcations by attorneys. Plaintiff claims that the rule is legislative in nature, and was adopted by the Court, a non-elected body, in violation of the principle of one person, one vote, and is in other respects a denial of equal protection and due process. The sole question presented on appeal is whether the district court erred in ruling that the suit raised no substantial constitutional questions. Since the ultimate resolution is not for us, we will not say in what respect we see one or more possible substantial constitutional issues, but a majority of the court does see such.

The order of the district court is vacated and the cause is remanded for further proceedings consistent herewith. No costs.

By the Court:

Clerk

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT HAGOPIAN

V. CIVIL ACTION NO. 74-2813-F

THE JUSTICES OF THE SUPREME JUDICIAL COURT

Before Aldrich, Senior Circuit Judge, Murray and Freedman, District Judges.

ORDER

March 23, 1977

FREEDMAN, D.J.

Plaintiff Hagopian, a member of the Massachusetts bar, brings this action pursuant to 42 U.S.C. §1983. He challenges the constitutionality of certain rules promulgated by the Supreme Judicial Court of Massachusetts establishing a Clients Security Fund and assessing annual fees, a portion of which is used to finance the fund.[1] The Clients Security Fund is designed to reimburse clients who have

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1 These rules are set forth in full in an appendix to this order.

incurred losses as a result of defalcations of members of the bar, acting either as attorneys or as fiduciaries. The plaintiff contends the rules are legislative in nature and their adoption by a non-elected court violates the principle of one person, one vote set forth in Reynolds v. Sims, 377 U.S. 533 (1964). Plaintiff asserts that the power to issue the rules in question is derived from the police power and taxing power of the state and that the unbridles delegation of this power to an appointed non-accountable body is a violation of equal protection and due process.

Plaintiff's complaint was initially dismissed by a single judge district court. However, the Court of Appeals for the First District, holding that the suit raised one or more substantial constitutional questions, vacated the order of the single justice and remanded the case to this three-judge court.

Upon remand, a case has been brought to the attention of the court which had not been presented to the Court of Appeals. We believe this case, In re Member of the Bar, 257 A. 2d 382 (Del. 1969), appeal dismissed sub nom., In re Reed, 396 U.S. 274

(1970), is dispositive of the plaintiff's claims. In Reed, the Supreme Court of Delaware upheld the constitutionality of the Delaware Supreme Court rule which established a clients security fund. The Delaware court concluded that the power to establish such a fund was part of the inherent power of the courts to sustain the standards of the bar, that the rule was a reasonable means of insuring the bar's reputation, and that the fee imposed to finance the fund was an assessment and not a tax. The United States Supreme Court dismissed an appeal for want of a substantial federal question. In re Reed, 396 U.S. 274 (1970). Such a dismissal is a disposition on the merits. Hicks v. Miranda, 422 U.S. 332, 343-45 (1975). Upon consideration of the foregoing, the court dismisses the plaintiff's complaint.

_____
Senior Circuit Judge

_____
District Judge

_____
District Judge

Appendix C

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

ROBERT W. HAGOPIAN,
Individually and on
behalf of all others
similarly situated,
Plaintiffs

v.

CIVIL ACTION
CA 74-2813-F

THE JUSTICES OF THE
SUPREME JUDICIAL COURT,
Defendants

NOTICE OF APPEAL

Notice is hereby given that Robert W. Hagopian, plaintiff above named, hereby appeals pursuant to 28 U.S.C. 1253 to the United States Supreme Court from the order of the district court dismissing plaintiff's complaint on March 23, 1977.

_____
Robert W. Hagopian

Appendix D

Rule 4:01 reads in relevant part:

BAR DISCIPLINE

§1. Jurisdiction

(1) Any attorney admitted to, or engaging in, the practice of law in this Commonwealth shall be subject to this court's exclusive disciplinary jurisdiction and the provisions of these rules as amended from time to time.

. . . . .

§5. The Board of Bar Overseers

(1) This court shall appoint a Board d of Bar Overseers (Board) to act, as provided in this Chapter Four, with respect to the conduct and discipline of attorneys and in such matters as may be referred to the Board by any court or by any judge or justice. ...

. . . . .

§9. Immunity

(1) Complaints submitted to the Board or the Bar Counsel shall be confidential and conditionally privileged. The complaintant shall be immune from liability based upon his complaint and

any testimony given by him relative thereto, and any witness shall be immune from liability based upon his testimony given in the proceeding provided that no such immunity shall be extended to a complaintant or witness who is responsible for any unreasonable disclosure of the complaint or testimony adduced in the proceeding or who acts in bad faith.

. . . . .

Rule 4:02 reads in relevant part:

PERIODIC REGISTRATION OF ATTORNEYS

(1) Every attorney admitted to, or engaging in, the practice of law in this Commonwealth, within three months after the effective date of this chapter or within three months of his becoming subject thereto and annually thereafter, shall file with the Board a registration statement setting forth his current residence and office addresses, and such other information as this court may from time to time direct, including the date of his admission to the bar of this court and the fact concerning his admission to practice in each other jurisdiction including each Federal court and administrative body where he has been admitted. ...

§2. Any attorney who fails to file the statement or any supplement thereto in accordance with the requirements of (a) above shall be subject to immediate suspension until he shall have complied therewith, whereupon he shall be reinstated without further order. An attorney aggrieved by such suspension may apply to a justice of this court for summary relief.

. . . . .

Rule 4:03

PERIODIC ASSESSMENT OF ATTORNEYS

(1) Every attorney required to register in accordance with Rule 4:02, other than those on inactive status pursuant to that rule and suspended attorneys, shall pay an annual fee as established by the court from time to time, which shall be paid to the Board with the registration statement required under Rule 4:02. The fee so paid subject to any applicable orders of this court shall be used to defray the costs of attorney registration and disciplinary enforcement, to provide funds for the operation of the Clients' Security Board and Fund established under Rule 4:04, and for such other purposes as the Board, with the approval of the

court, from time to time shall determine.*

(2) To any attorney who fails to pay the fee required under subsection (1) above within thirty days, the Board shall send a certified or registered letter mailed to the address furnished on the last registration statement filed as required by Rule 4:02, notifying the attorney of his failure to pay the required fee and that, if within forty-five days from the date of the mailing of the certified or registered letter he shall fail to pay the fee, a summary notice of suspension will issue. An attorney aggreived by any action taken by the Board under this Section may apply to a single justice for summary relief.

(3) Any attorney suspended under the provisions of subsection (2) above shall, as a condition precedent to reinstatement, pay all arrears due from the date of his last payment to the date of his request for reinstatement, and shall also pay an additional late assessment of ten dollars.

* On July 28, 1976, the justices of the Supreme Judicial Court entered an order effective September 1, 1976 establishing the amount of the annual fee which for most attorneys is $25.

Rule 4:04 reads in relevant part:

CLIENTS' SECURITY BOARD AND FUND

Section 1.

A Clients' Security Board (Board) shall be appointed by the full court. This Board shall consist of five members of the Massachusetts bar to serve as public trustees to receive, hold, manage, and distribute the funds allocated to the Board from the annual fees assessed under subsection (1) of Rule 4:03. Such funds shall be held by the Board in trust as a separate fund to be known as the Clients' Security Fund (Fund). The purpose of the Fund is to discharge, as far as practicable and in a reasonable manner, the collective professional responsibility of the members of the Massachusetts bar with respect to losses caused to the public by defalcations of members of the bar, acting either as attorneys or as fiduciaries (except to the extent to which they are bonded, or to the extent such losses are otherwise covered).

. . . . .

Rule 4:05

CLAIMS BY CLIENTS FOR
REIMBURSEMENT OF LOSSES

Section 1.

The Board may consider applications by clients for reimbursement of losses discovered after the effective date of these rules, and may honor, pay, or reject such claims in whole or in part to the extent that funds are available and in accordance with such rules, regulations, and principles as may be in force from time to time, especially the provisions of this Chapter Four. All reimbursements shall be a matter of grace, not right, and no client, beneficiary, employer, organization, or other person shall have any right or interest in the Fund.

Section 2.

No application for reimbursement from the Fund shall be allowed unless the attorney of the client applicant (1) was, at the time the claim arose, a member of the Massachusetts bar with an office within the Commonwealth and engaged in active practice, and (2) shall have died, or have been disbarred or suspended from the practice of law, or have resigned from the Massachusetts bar.

Section 3.

The Board, in determing in its discretion whether any application for reimbursement from the Fund shall be allowed, shall attempt in the public interest to establish fair, reasonable, and consistent principles for the allowance and rejection of claims in the circumstances existing from time to time, and shall consider the following matters and factors together with such other circumstances as the Board may deem appropriate and relevant:

(1) The amounts available are likely to become available to the Fund for payment of claims; the size and number of claims likely to be presented in the future; the total amount of losses caused by defalcations of any one attorney or associated groups of attorneys; and the unreimbursed amounts of claims theretofore recognized by the Board as meriting reimbursement but for which complete reimbursement has not been made.

(2) The amount of the claimant's loss as compared with the amount of the then known losses sustained by other applicants who may merit reimbursement from the Fund; the degree of hardship suffered by the claimant as compared with that suffered by other applicants; and any negligence or conduct of the

claimant which may have contributed to the loss.

Section 4.

In addition to other conditions and requirements, the Board may require any applicant, as a condition of any payment from the Fund, to execute such instruments, to take such action, and to enter into such agreements as the Board may direct, including assignments, subrogation agreements, trust agreements, and promises to cooperate with the Board in making and prosecuting claims or charges against any person. The Board may request individual lawyers and bar associations to assist it in the investigation of claims.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-180

ROBERT W. HAGOPIAN
PLAINTIFF-APPELLANT,

v.

THE JUSTICES OF THE
SUPREME JUDICIAL COURT
DEFENDANTS-APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION TO AFFIRM OF THE APPELLEES, THE JUSTICES OF THE SUPREME JUDICIAL COURT

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Opinion Below

The opinion of the United States District Court for the District of Massachusetts is officially reported at 429 F. Supp. 367 (D. Mass. 1977).

Jurisdiction

The order of the United States District Court for the District of Massachusetts dismissing the complaint was entered on March 23, 1977. A Notice of Appeal to this Court was filed by the Appellant in the United States District Court for the District of Massachusetts on April 25, 1977. The jurisdiction for the appeal is based on 28 U.S.C. §1253 which authorized direct appeal from a decision of a three-judge district court convened pursuant to the former version of 28 U.S.C. §§2281, 2284.[1] This Motion to Affirm is filed pursuant to United States Supreme Court Rule 16 because it is manifest that the questions on which the decision of the cause depends are so unsubstantial that they do not warrant plenary consideration by this Court.

Constitutional Provisions and Statutes Involved

Fourteenth Amendment To The United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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[1] On August 12, 1976 Congress enacted P.L. 94-381 which repealed 28 U.S.C. §2281 and severely restricted the circumstances requiring the convening of a three-judge court. P.L. 94-381 by its terms does not apply to any action commenced on or before the date of its enactment. Therefore the repealer does not affect this appeal.

Rules Of The Supreme Judicial Court

The Rules of the Massachusetts Supreme Judicial Court are reproduced as an appendix to the opinion below at 429 F. Supp. 367, 368-370 (D. Mass 1977).

Question Presented

Whether the establishment by a non-elected State Supreme Court of an annual registration requirement and accompanying fee, a portion of which fee is utilized to fund a Clients' Security Fund, contravenes the First or Fourteenth Amendments to the United States Constitution?

Statement of the Case

On September 1, 1974, the Supreme Judicial Court for the Commonwealth of Massachusetts promulgated Supreme Judicial Court Rules 4:01-4:08 which, *inter alia,* established a system for registering attorneys and requiring the payment of an annual registration fee which in most cases amounts to $25 per year. The Rules also establish a Clients' Security Fund which is maintained by allocating a portion of the fees collected to the Fund. The Fund is designed to reimburse clients who have incurred losses as a result of defalcations of members of the bar, acting either as attorneys or as fiduciaries. 429 F. Supp. at 368.

Plaintiff, prior to the effective date of the Rules, brought this action in United States District Court for the District of Massachusetts. The District Court on May 24, 1976 denied plaintiff's request to convene a three-judge federal court pursuant to 28 U.S.C. §§2281, 2284 and dismissed the complaint. On appeal, the First Circuit Court of Appeals on December 15, 1976 remanded the matter to the District Court for the convening of a three-judge federal court. A

three-judge court was subsequently convened and on May 23, 1977 that court dismissed plaintiff's complaint. Plaintiff then appealed to this Court pursuant to 28 U.S.C. §1253.

Argument

THE DECISION OF THE THREE-JUDGE FEDERAL COURT IS CLEARLY CORRECT AND SHOULD BE SUMMARILY AFFIRMED WITHOUT PLENARY CONSIDERATION BY THIS COURT.

I. The Promulgation of Rules 4:02-4:06, Imposing An Annual Registration Fee On Members Of The Massachusetts Bar, Was Well Within The Power Of The Supreme Judicial Court and Violated No Provision of the United States Constitution.

A. *The One Man, One Vote Contention*

Plaintiff-Appellant has brought this action challenging the constitutionality of the Supreme Judicial Court's establishment of an annual registration fee for attorneys, a portion of which is attributable to the Clients' Security Fund. His contention comes in three steps. First he characterizes the act of imposing a fee on lawyers as legislative in nature. Second, he argues that, because the Justices who took this action were appointed, they were not chosen according to the one-man, one-vote principle applicable to legislative bodies. *See, e.g., Reynolds* v. *Sims,* 377 U.S. 533 (1964); *Baker* v. *Carr,* 369 U.S. 186 (1962). He concludes, then, that the product of their legislative action, Rules 4:02-4:06, is unconstitutional. These claims have no foundation in law. The imposition of the fee on lawyers is not a legislative act but rather an incident to the exercise of the Court's judicial functions. The power of the state courts to impose such a fee is firmly established. The one-man, one-vote principle has never been used by the courts against an appointive body but has been applied solely to protect the equal power of individual votes in an elective context. Even in its proper context, the one-man, one-vote principle has never, in and of itself, caused the invalidation of a legislative act but has worked exclusively to recast the boundaries of voting districts. Finally, and fundamentally, a state's distribution of governmental power among its branches is a matter of state prerogative and implicates no federal constitutional question. On every front, therefore, the appellant's claim merits rejection, and the decision of the District Court should be summarily affirmed.

The general question whether a state court can require attorneys to pay a reasonable annual registration fee was treated, and laid to rest, by the United States Supreme Court in *Lathrop* v. *Donohue,* 367 U.S. 820 (1961). In *Lathrop,* the Supreme Court held that the Wisconsin Supreme Court could constitutionally promulgate Rules which integrated the State Bar and require each attorney to pay annual dues of fifteen dollars. The Supreme Court addressed the constitutionality of annual fees as follows:

> We think that the Supreme Court of Wisconsin, in order to further the State's legitimate interests in raising the quality of professional services, may constitutionally require that the costs of improving the profession in this fashion should be shared by the subjects and beneficiaries of the regulatory program, the lawyers. . . . Given the character of the intergrated bar shown on the record, in the light of the limitation of the membership requirement to the compulsory payment of reasonable dues, we are unable to find any impingement upon protected rights of association. *Id.* at 843.

Since *Lathrop* many more state judicial bodies have promulgated disciplinary and enforcement procedures funded by an annual attorneys' registration fee. *See, e.g., Petition of Tennessee Bar Ass'n,* 532 S.W. 2d 224, 229 (1975). *See also Amster, Clients' Security Fund: The New Jersey Story,* 1976 A.B.A.J. 1610 (an article describing the operation of the New Jersey Clients' Security Board, which is funded by an annual $50 fee). Federal courts in more recent decisions have followed *Lathrop* and rejected broad-based constitutional challenges to the authority of state judiciaries to require registration of attorneys and the payment of an annual fee. These decisions have been summarily disposed of by this Court on appeal. *May* v. *Supreme Court of Colorado,* 374 F. Supp. 1210 (D. Colo. 1974) *aff'd* 508 F.2d 136 (10th Cir. 1974) *cert. denied,* 422 U.S. 1008 (1975); *Buschbacher* v. *Supreme Court of Ohio,* C-2-75-743 (S.D. Ohio, October 1, 1976) ***aff'd sub nom.*** *Cuyahoga County Bar Ass'n* v. *Ohio Supreme Court,* 45 U.S.L.W. 3583 (Feb. 28, 1977); See also *Cantor* v. *Supreme Court of Pennsylvania,* 353 F. Supp. 1307 (E.D. Pa. 1973) *aff'd* 487 F.2d 1394 (3d Cir. 1974). Plainly *Lathrop* v. *Donohue* remains the controlling law with respect to registration fees.

Subsequent to the decision in *Lathrop* v. *Donohue, supra,* this Court dismissed an appeal from the Delaware Supreme Court which specifically challenged the constitutionality of judicial establishment of a Clients' Security Fund that was maintained by an annual attorneys' registration fee. *In Re Member of the Bar,* 257 A.2d 382 (Del. 1969), *appeal dismissed sub. nom., In Re Reed,* 396 U.S. 274 (1970). See also *Bennett* v. *Oregon State Bar,* 470 P.2d 945 (Ore. 1970); Annotation to *Bennett*: *Validity and Construction of Statutes or Rules Setting Up Clients' Security Fund,* 53 A.L.R. 3d 1298. The court below, in reliance on the authority of *Hicks* v. *Miranda,* 422 U.S. 332 (1975), held that

this Court's summary disposition of the constitutional claims in *In Re Reed, supra,* warranted dismissal of the complaint. 429 F. Supp. at 368. The summary disposition of the claims raised in *Reed* was thoroughly consistent with the prior pronouncements of this Court in *Lathrop* v. *Donohue, supra.* Therefore, the District Court's reliance on that summary dismissal as dispositive of the issues raised in this case was clearly correct.[2] *Cf. Mandel* v. *Bradley,* 45 U.S.L.W. 4701 (June 16, 1977). The challenged exercise of judicial authority upheld in *Reed* was identical to the action taken by the Supreme Judicial Court in the instant case. The nature of the constitutional claim in the instant case, as in *Reed,* involves a challenge under both the First and Fourteenth Amendments to the United States Constitution. In these circumstances, the District Court recognized that this Court has consistently upheld the authority of a State judiciary to impose a registration fee and, upon the authority of *Reed,* to require that a portion of the fee be allocated to a Client's Security Fund. Thus, the District Court correctly concluded that the disposition in *Reed* foreclosed the constitutional issues which appellant sought to raise, and dismissed the complaint. 429 F.Supp. at 368. In light of the consistent summary treatment which this Court has afforded challenges to the authority of a state judiciary to impose an annual registration fee for attorneys, this appeal clearly does not warrant plenary consideration and should be summarily affirmed. See *Cuyahoga*

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[2] In *Mandel* v. *Bradley, supra,* this Court reaffirmed that summary disposition of an appeal by this Court constitutes a decision on the merits. The Court cautioned against reading a summary affirmance as a renunciation by the Court of doctrines previously announced in its opinions issued after full argument. In the instant case, the Court's summary dismissal in *Reed* was entirely consistent with the doctrines set forth in *Lathrop,* and appellant's alternative request that the matter be remanded to the district court for further consideration gains no support from this Court's opinion in *Mandel* v. *Bradley.*

County Bar Ass'n v. *Ohio Supreme Court, supra; May* v. *Supreme Court of Colorado, supra; In Re Reed, supra.*

The appellant further suggests that subsequent decisions of the Supreme Court in the one-man, one-vote area have undercut the validity of the reasoning in *Lathrop* and its progeny. Of course, the summary dismissal of the appeal in *Reed* indicates otherwise. In any event, appellant relies upon the Supreme Court's statement in *Sailors* v. *Board of Education,* 397 U.S. 105 (1967) that "it need not decide . . . whether a state may constitute a local legislative body through the appointive rather than the local elective process." *Id.* at 109-110. The *Sailors Court,* as detailed below, refused to apply the one-man, one-vote standard to an administrative body. While, in passing, the Court cast a glance at the possible constraints on the powers of appointed bodies, it did no more than that. It in no way suggested that an appointed judicial body cannot promulgate Rules with respect to a subject — membership in the bar — over which it has inherent authority under state law. *See Opinion of the Justices,* 279 Mass. 607 (1932).

In constitutional adjudication the one-man, one-vote standard has served exclusively as a benchmark for determining whether specific elections are being conducted in violation of the Equal Protection Clause of the Fourteenth Amendment. *See, e.g., Chapman* v. *Meier,* 420 U.S. 1 (1975); *Reynolds* v. *Sims, supra.* In *Reynolds* v. *Sims,* for example, the inquiry of the Court focused upon the number of voters in various state legislative districts in Alabama. The *Reynolds* Court found an equal protection violation where malapportionment of the state legislature diluted the right to vote of underrepresented citizens. There is no suggestion in *Reynolds,* however, that legislation enacted by the malapportioned legislature was for that that reason invalid. *Cf. Fortson* v. *Morris,* 385 U.S. 231 (1966); *Sullivan* v. *Alabama State Bar,* 295 F.Supp. 1216 (N.D. Ala. 1969). The

Court in *Reynolds* simply ordered reapportionment to remedy the equal protection violation. *See also Avery* v. *Midland County,* 390 U.S. 474 (1976). Thus, even if this Court took the novel step of applying *Reynolds* to the selection of state high court judges the principle would not, in itself, provide a basis for invalidating the challenged Rules.

In short, one-man, one-vote cases do not address separation of powers issues. And nothing in *Baker* v. *Carr,* 369 U.S. 186 (1961), and its progency suggests that the "one man, one vote" principle has any application to appointive positions or to positions in which the essential functions are judicial rather than governmental or legislative. In *Sailors* v. *Board of Education, supra,* the Court decided that the one-man, one-vote principle did not apply to a local school board which was appointive in nature where the Board performed essentially administrative functions. See also *Dusch* v. *Davis,* 387 U.S. 112 (1967). Further, the *Sailors* Court held that "[a]t least as respects non-legislative officers, a State can appoint local officials or elect them or combine the elective and appointive system." 387 U.S. at 111. The *Sailors* Court then concluded that since the choice of members of the board "did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy." *Id.* Subsequently in *Hadley* v. *Junior College District,* 397 U.S. 50 (1969), the Court held:

> "[A]s a general rule, whenever a state or local government *decides to select persons by popular election to perform governmental functions,* the Equal Protection Clause of the Fourtenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, ..." 397 U.S. at 56 (emphasis added).

Thus the decisions culminating in *Hadley* have applied one-man, one-vote principles exclusively to state and local *elections* of legislative officials but do not suggest a constitutional basis for invalidating the judiciary's exercise of its powers.

Finally, several courts have rejected application of the one-man, one-vote principle even where state law provides for election of judges, a context far more analogous to *Reynolds* than this case, on the grounds that the essentially judicial nature of the position renders the principle inapposite. *Wells* v. *Edwards*, 347 F.Supp. 453 (M.D. La. 1972), *aff'd*, 409 U.S. 1095 (1973); *Holshouser* v. *Scott*, 335 F.Supp. 928 (M.D. N.C. 1971); *New York State Association of Trial Lawyers* v. *Rockefeller*, 267 F.Supp. 928 (S.D.N.Y. 1967). The rationale underlying *Wells* was plainly stated:

> "The State judiciary, unlike the legislature, is not the organ responsible for achieving representative government." 347 F.Supp. at 456.

The Supreme Court's summary affirmance of *Wells* v. *Edwards, supra*, forecloses the argument[3] that one-man, one-vote is relevant to the issue whether appointed judges can take action with respect to conditions of membership in the Bar of the Commonwealth.

B. ***The Remaining Contentions Under the First and Fourteenth Amenaments.***

In addition to his primary challenge based on the one-man, one-vote rationale, appellant has made claims under

[3] A summary disposition on appeal, either by affirmance or dismissal for want of substantial federal question, is a disposition on the merits [illegible] v. *Miranda*, 422 U.S. 332, 344 (1975). *Cf. Mandel* v. *Bradley*, 45 U.S.L.W. 4701 (June 16, 1977).

the First and Fourteenth Amendments. With respect to his First Amendment claim, it is clear that the establishment of the Fund does not deny him rights of association and political expression guaranteed by the First Amendment. The Rules in no way restrict his right to political association with whomever he chooses. Similarly, the Rules do not require him to join an integrated bar association. Furthermore, the Rules in no way dilute his voting rights vis-a-vis other citizens of the Commonwealth nor do the Rules restrict his right to vote in any election for which he is otherwise eligible. Because no denial of the right to vote or of political association is involved in the instant case, appellant has failed to raise a substantial federal claim under the First Amendment. *See Williams* v. *Rhodes*, 393 U.S. 23 (1968).

As to the appellant's claims under the Fourteenth Amendment, he argues that the Rules violate the Equal Protection Clause because attorneys are somehow "fenced out" of the elective process. This is a frivolous assertion, without a conceptual basis. Furthermore, the case of *Hunter* v. *Erickson*, 393 U.S. 385 (1968), which appellant cites as support, has no bearing whatsoever on this case. In *Hunter*, the United States Supreme Court struck down a local ordinance which made passage of municipal legislation designed to end racial, religious, or ancestral housing discrimination more difficult than passage of all other types of municipal legislation. *Id.* at 390. The *Hunter* Court based its decision upon a finding that the challenged procedure was designed to discriminate against racial minorities, thereby implicating a suspect classification and requiring strict scrutiny under the Fourteenth Amendment. *Id.* at 391-392. *See Loving* v. *Virginia*, 388 U.S. 184, 192 (1964). Attorneys, of course, are not a discrete and insular minority requiring the special protection of the Fourteenth

Amendment.[4] *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152-153, n. 4 (1938); *Bennett* v. *Oregon State Bar, supra.* The Equal Protection Clause presents no barrier to Rules reasonably related to the Supreme Judicial Court's inherent authority to regulate the practice of law.

In sum, none of the appellant's constitutional claims raises a substantial federal question which warrants plenary consideration by this Court. Accordingly, this Court, consistent with its prior treatment of similar cases, should summarily affirm the decision of the court below.

Conclusion

For the reasons stated above, the Appellees, the Justices of the Supreme Judicial Court, respectfully urge that this Court summarily affirm the decision of the Federal District Court for the District of Massachusetts.

Respectfully submitted,

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[4] In *Hunter* v. *Erickson*, Justice Harlan noted, in a concurring opinion, that putting Negroes to an arduous task such as that involved in amending a state constitution is not, by itself, unconstitutional. For in that situation, unlike the one in *Hunter*, the procedure making a constitutional amendment difficult applies to all, and is therefore neutral on its face. 393 U.S. at 395. In short, it is the racial discrimination, not the difficulty of the task, that spells a denial of equal protection.